

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Lily Carayannis	Team: Squad #16	CCRB Case #: 201507307	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Saturday, 08/29/2015 6:45 PM	Location of Incident: Front of § 87(2)(b)	18 Mo. SOL 2/28/2017	Precinct: 46		
Date/Time CV Reported Mon, 08/31/2015 9:56 AM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Mon, 08/31/2015 9:56 AM		

Complainant/Victim	Type	Home Address
§ 87(2)(b)	§ 87(2)(b)	§ 87(2)(b)

Subject Officer(s)	Shield	TaxID	Command
1. POM Daniel Kern	9634	954999	PBBX

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Marco Morrone	10632	955223	PBBX
2. POM Diego Marin	03763	954097	046 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Daniel Kern	Abuse: PO Daniel Kern threatened to arrest § 87(2)(b)	§ 87(2)(b)
B.POM Daniel Kern	Abuse: PO Daniel Kern frisked § 87(2)(b)	§ 87(2)(b)
C.POM Daniel Kern	Abuse: PO Daniel Kern searched § 87(2)(b)	§ 87(2)(b)
D.POM Daniel Kern	Abuse: PO Daniel Kern improperly issued a summons to § 87(2)(b)	§ 87(2)(b)

### Case Summary

On August 31, 2015, ### § 87(2)(b) filed the following complaint with the CCRB over the telephone on his own behalf.

On August 29, 2015, at approximately 6:45 p.m., § 87(2)(b) was in front of his apartment building at § 87(2)(b) in the Bronx, when he was approached by PO Daniel Kern, from Patrol Borough Bronx. § 87(2)(b) was standing with his back upon a scaffolding pole when PO Kern approached. There was a black plastic milk crate next to him. PO Kern requested his identification. § 87(2)(b) provided this information, and PO Kern handcuffed him and told him that he was in violation of sitting on a milk crate. § 87(2)(b) argued that he was not sitting on the milk crate, and PO Kern asked him if he wanted to go to jail (**Allegation A**). PO Kern frisked § 87(2)(b)'s waistband, pants, and shirt (**Allegation B**). PO Kern asked what the hard object in § 87(2)(b)'s pocket was, and § 87(2)(b) stated it was his keys. PO Kern entered every pocket and lifted § 87(2)(b)'s shirt (**Allegation C**). PO Kern issued § 87(2)(b) a summons for "unlawful use of a milk crate" (**Allegation D**).

This case was reassigned from Investigator Christina Vuong to Investigator Lily Carayannis on October 16, 2015.

### Mediation, Civil and Criminal Histories

- § 87(2)(b) declined to mediate this complaint.
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- As of November 17, 2015, § 87(2)(b) had not filed a Notice of Claim with the City of New York (Board Review 14).

### Civilian and Officer CCRB Histories

- This is the second CCRB complaint that § 87(2)(b) has been a party. § 87(2)(b)  
[REDACTED]  
[REDACTED]
- PO Kern has been a member of the service for two years and he has no substantiated CCRB allegations pled against him § 87(2)(g)  
[REDACTED]

### Findings and Recommendations

#### Allegation not Pleaded

It is undisputed that § 87(2)(b) was stopped. The stop was not separate from the summons issued by PO Kern. § 87(2)(g)  
[REDACTED]  
[REDACTED]

#### **Allegation A—Abuse of Authority: PO Daniel Kern threatened to arrest § 87(2)(b)** [REDACTED]

§ 87(2)(b) (Board Review 12) alleged that when he questioned PO Kern about handcuffing him for a violation and denied the allegation that he was unlawfully using a milk crate, PO Kern asked if he wanted to be arrested.

PO Kern (Board Review 13) stated that he never contemplated arresting § 87(2)(b) and he did not have any conversation with § 87(2)(b) about being arrested. PO Kern denied threatening to arrest § 87(2)(b)

§ 87(2)(g)

**Allegation B—Abuse of Authority: PO Daniel Kern frisked § 87(2)(b)**

**Allegation C—Abuse of Authority: PO Daniel Kern searched § 87(2)(b)**

It is undisputed that § 87(2)(b) was in front of his building near other people who left the location. It is undisputed that PO Kern lifted § 87(2)(b) shirt and frisked his waistband. § 87(2)(b) was not arrested and was issued one summons for “the unlawful use of a milk crate” (see below). It is undisputed that § 87(2)(b) did not have contraband on his person.

§ 87(2)(b) (Board Review 12) stated that PO Kern asked him who was smoking. PO Kern frisked his waistband, shirt, and pockets. PO Kern lifted his shirt up. PO Kern also entered all of his pockets and removed the items therein. PO Kern stated that he did not reach into § 87(2)(b) pocket.

PO Kern (Board Review 13) stated that he first approached § 87(2)(b) and the other civilians because he smelled marijuana, the individuals and § 87(2)(b) were blocking the walkway, and because § 87(2)(b) was sitting on a milk crate, which PO Kern believed was illegal. PO Kern did not see any civilian actually have difficulty in passing the civilians who were near § 87(2)(b). PO Kern did not see the alleged marijuana, he could not tell the source of the marijuana, and he told the other civilians to leave the area. PO Kern and the other officers looked on the ground for marijuana, but did not find any. PO Kern approached § 87(2)(b) to summons him. PO Kern described § 87(2)(b) as calm and cooperative. PO Kern requested § 87(2)(b) information, which § 87(2)(b) provided. PO Kern did not suspect § 87(2)(b) of any crime other than sitting on the milk crate. PO Kern was not contemplating arresting § 87(2)(b). PO Kern observed a bulge on § 87(2)(b) waistband. § 87(2)(b) shirt covered his waistband and the bulge was coming through his shirt on the left side. The bulge was approximately 5 inches long and PO Kern could only see one corner of it, which was at a right angle. PO Kern believed that the bulge could be a weapon because it was on his waistband and because it had a right angle visible. He believed that it could be a gun. PO Kern did not see any other bulges. PO Kern frisked the bulge and the rest of § 87(2)(b) waistband. PO Kern felt what felt like a phone, a fact that he confirmed by lifting his shirt and looking at it. PO Kern did not believe that § 87(2)(b) was concealing a weapon anywhere else.

People v. DeBour 40 N.Y.2d 210, 215 (Board Review 10) Officers are permitted to frisk an individual when they have reasonable suspicion that the individual has a weapon.

People v. Forrest 77 A.D.3d 511 (App. Div. 1<sup>st</sup> Dep’t 2010) (Board Review 11) Suspicion that an individual has engaged in a drug transaction is an insufficient basis for frisking such person.

People v. Calizaire 208 A.D.2d 378 (1994) (Board Review 05) Observation of a bulge in an individual’s waistband is not enough, alone, to provide reasonable suspicion of a weapon.

People v. Thompson 127 A.D.3d 658 (2015) (Board Review 03) Lifting a person's shirt is a search.

People v. Miles 208 A.D.2d 1089 (1994) (Board Review 04) Once an officer determines that a bulge is not a weapon during a frisk, the officer is not justified in the further intrusion of lifting the individual's shirt.

§ 87(2)(g)

**Allegation D—Abuse of Authority: PO Daniel Kern improperly issued a summons to**

§ 87(2)(b)

PO Kern (Board Review 13) acknowledged that he summonsed (Board Review 07) § 87(2)(b) for the unlawful use of a milk crate. PO Kern was aware of the statute through a cellphone application (hereafter called an “app”) called “Summonses.” During his interview he showed the investigator the app, which read “unlawful use of milk crates” (Board Review 08). Both the app and the actual law possess the same language otherwise. PO Kern stated that he did not receive this app from the NYPD Police Academy, but instead learned of it from a fellow officer. PO Kern believed that the law stated that individuals are not allowed to use a milk crate to sit on.

General Business Article 17 (270) (Board Review 01) covers the “unlawful detention of milk cans.” The law states that it is unlawful to detain milk *cans* without the authorization of the owner of these *cans*.

§ 87(2)(g)

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Squad: 16

Investigator: \_\_\_\_\_ Lily Carayannis November 17, 2015  
Signature Print Date

Pod Leader: \_\_\_\_\_  
Title/Signature Print Date

